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# Vol. IX, Tab 47 - Ex. 24 - Deposition of Edward Blair (Expert for Google)

Edward Blair

*Google*

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
ALEXANDRIA DIVISION

1

ROSETTA STONE, LTD.,

Plaintiff,

vs.

GOOGLE, INC.,

Defendant.

Case No.

1:09-CV-00736

(GBL/TCB)

COPY

Washington, D.C.

Wednesday, March 3, 2010

Deposition of:

EDWARD ALLEN BLAIR, Ph.D.

called for oral examination by counsel for  
Plaintiff, pursuant to notice, at 1440 New York  
Avenue, N.W., before Monica A. Voorhees, of Capital  
Reporting, RPR/CSR, a Notary Public in and for the  
District of Columbia, beginning at 9:12 a.m., when  
were present on behalf of the respective parties:

(866) 448 - DEPO

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PROCEEDINGS

WHEREUPON,

EDWARD ALLEN BLAIR, Ph.D.,

called as a witness, and having been first duly  
sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFF  
BY MR. LELAND:

Q. Good morning, Dr. Blair, how are you  
doing?

A. I'm doing great, thank you.

Q. You've been deposed before, correct?

A. I have, yes.

Q. How many times do you think you've been  
deposed?

A. Somewhere in the range of 20 to 50 I  
would guess.

Q. When was the last time you were deposed?

A. Within the last month.

Q. Last month. In what case was that?

A. APE V Bay, B-A-Y, Machinery, I think is  
how that particular case was styled. There's a  
cluster of cases which was why I have trouble

1 just one second?

2 Q. Yes.

3 MS. CARUSO: Here.

4 THE WITNESS: The bottom line relates to  
5 Wikipedia, but sort of the more important point, the  
6 top two lines do not.

7 BY MR. LELAND:

8 Q. Okay, well can you, why don't we take a  
9 moment to walk through this.

10 Can you explain what these calculations  
11 are?

12 A. Sure. The first line should be read as  
13 C-O-N-F over total, confused over total, and this is  
14 Mr. VanLiere's -- excuse me, Dr. VanLiere's  
15 calculation that in the test condition there were  
16 188 total respondents, 89 of them gave some evidence  
17 of confusion, as he counts it; that is to say, and  
18 forgive me for this being tedious, 89 of them said  
19 that at least one of the target links in the test  
20 condition either was a Rosetta Stone company Website  
21 or was endorsed by Rosetta Stone. In any case,  
22 there were 89 such respondents. Out of 188, that's

1 47 percent.

2 In the control condition there were  
3 191 total respondents, 57 of them gave, as  
4 Dr. VanLiere counted it, evidence of confusion, that  
5 is to say, and again, sorry for this being kind of  
6 long, 57 of them indicated that one of the target  
7 links in the control condition either was, at least  
8 one, excuse me, of the target links was either a  
9 Rosetta Stone company Website or endorsed by Rosetta  
10 Stone, excluding those who said that the Wikipedia  
11 software site was endorsed by Rosetta Stone, and  
12 that's 30 percent. That's the first line.

13 Q. So if I can interrupt, basically the  
14 first line, and let me mark this as Blair Exhibit  
15 Number 3.

16 (Blair Deposition Exhibit No. 3  
17 was marked for identification)

18 BY MR. LELAND:

19 Q. The first line is basically a reflection  
20 of Dr. VanLiere's calculations, in other words?

21 A. Exactly.

22 Q. And we would get a net confusion rate of

1 17 percent based on these calculations at the top?

2 A. That is correct.

3 Q. Okay. And what are the calculations on  
4 the second line?

5 A. Okay. The second line should be read as  
6 C-O-N-F over asked by which I mean confused, number  
7 confused over number asked. This goes to the point  
8 that Dr. VanLiere used the selling question, does  
9 that link sell Rosetta Stone products as a filter  
10 question and if, if you did not say that a link sold  
11 Rosetta Stone products, you were not asked the  
12 confusion questions.

13 In the test condition, 70, 7-0, 70  
14 respondents were filtered out completely. They were  
15 not asked the confusion questions for any of the  
16 links because they did not indicate that any of the  
17 target links sold Rosetta Stone products. So only,  
18 so that leaves 118 that were actually asked the  
19 confusion questions at least once.

20 So, 89 who indicated confusion over 118  
21 who were asked the questions and given an  
22 opportunity to evidence confusion is 75 percent.



1                   In the control condition, 113, if my  
2 math is correct, 113 respondents were completely  
3 filtered out. They did not indicate that any of the  
4 target links in the control condition sold Rosetta  
5 Stone products in their opinion. That left 78 who  
6 at least once were asked the confusion questions  
7 with respect to those target links, and just for  
8 clarity, when I say that, when I refer to the  
9 control condition and target links, I'm not counting  
10 the Rosetta Stone official company Website.

11           Q:       Understood.

12           A.       So, 57 confused out of 78 who were asked  
13 the confusion questions, given an opportunity, is  
14 73 percent. And then following what you said  
15 before, the net confusion would be 2 percent.

16                   And then the third line, that second  
17 line conforms to Mr. VanLiere's, Dr. VanLiere's  
18 counting of confusion in that it excludes  
19 respondents who indicated that the Wikipedia  
20 software site is endorsed.

21                   In my opinion, as indicated in the  
22 report, I, I think they should be included. I don't

1 think he has adequate justification to exclude them.

2 So if those respondents are included,  
3 then in the control condition you would go to  
4 69 respondents who evidenced confusion out of  
5 78 respondents who were given the opportunity, who  
6 were asked questions at least once is an 88 percent  
7 rate. You'd still be 75 percent in the test  
8 condition, that does not effect the test condition  
9 calculation. So your net confusion would actually  
10 go to negative 13 percent.

11 Q. Is it fair to say that your argument  
12 here is that the threshold question, and when I say  
13 threshold question, I mean the question regarding  
14 whether a site sells Rosetta Stone products, if you  
15 accept my characterization as a threshold question,  
16 is it fair to say that your argument here is that if  
17 the threshold question were counted against  
18 confusion, that there would basically be no net  
19 confusion?

20 A. I'm not sure --

21 MS. CARUSO: Objection.

22 THE WITNESS: -- I understand the



1. you decided not to do?

2 A. No.

3 Q. Okay. Let's go through, before we delve  
4 into your report, can you summarize for me your  
5 opinions in this engagement?

6 A. Well, I would feel most comfortable if I  
7 went through the report because of course the  
8 opinions are contained in the report, but in broad  
9 terms I would say that I think Dr. VanLiere's study  
10 in the test versus control condition has a, has what  
11 I think I characterize as an apples and oranges  
12 comparison. I would say that the figures we went  
13 through earlier give some idea that when you try to  
14 get it to apples to apples, there is no net  
15 confusion.

16 I note that taking the confusion as  
17 defined by Dr. VanLiere, that the net confusion all  
18 derives from the endorsement measure, none of it is  
19 on the owned company measure. I believe I indicate  
20 in the report that when you take that point, that  
21 it's all endorsement in conjunction with the point  
22 that the, that you have the different nature of the

1 links, commercial links about Rosetta Stone's  
2 software versus links that are largely about the  
3 Rosetta Stone historical artifact, that collectively  
4 to me that suggests that what you're seeing is that  
5 people think or at least some people think that you  
6 endorse your commercial partners.

7 I noted that if you look at the test  
8 links separately, you have widely varying rates of  
9 confusion as measured by Dr. VanLiere, so that  
10 indicates that the confusion is, varies ad by ad.  
11 It's not inherent in advertising.

12 You know, one of the sites essentially  
13 gets down almost to zero, so it's not inherent in  
14 advertising.

15 And, oh, Dr. VanLiere's treatment of the  
16 stimulus and the data, I realize I'm not  
17 summarizing, I'm, you know, I'm kind of going  
18 through the points.

19 Q. Yeah.

20 A. But Dr. VanLiere dropped the Rosetta  
21 Stone ad from the test stimulus. I don't agree with  
22 that. Dr. VanLiere chose not to count respondents

1 who indicated that the Wikipedia software site was  
2 endorsed as being confused with no such  
3 accommodation for Amazon or Coupon Cactus; I, I  
4 don't think that was appropriate.

5 And then we have sort of a, what I'll  
6 characterize as kind of technical issues.  
7 Population, do we have the right population here and  
8 that the nature of the procedure left people on the  
9 page longer than they would be on the page under  
10 normal market conditions.

11 I may have left out one of the points,  
12 but, you know, these are certainly points that I  
13 recall.

14 Q. Thank you. Well why don't we start  
15 going through the points.

16 Let's start on page 2, in the second  
17 paragraph you do start in my opinion, Dr. VanLiere's  
18 survey does not show a likelihood of confusion  
19 regarding the source of goods.

20 Is it your understanding that  
21 Dr. VanLiere's survey was designed to measure  
22 confusion regarding the source of goods?

1 pretty close to the limits of my knowledge on this.

2 BY MR. LELAND:

3 Q. Well is it your understanding that  
4 position number one would generate the most traffic?

5 A. That would be my guess.

6 Q. Guess. And why, if that's your guess,  
7 why would you assume that?

8 A. The, yeah, if position makes a  
9 difference, that would, that would be the situation.  
10 If there is a difference in, if there's a difference  
11 in cost based on a difference in position, the  
12 implication is that you get more by having a higher  
13 position.

14 Q. And why do you think that's the case  
15 that the top position generates the most traffic?

16 MS. CARUSO: Objection.

17 THE WITNESS: Well, I, you know, I, I  
18 think this would be a factual issue, but I suppose  
19 the idea would be that people read left to right,  
20 top to bottom.

21 BY MR. LELAND:

22 Q. And so people would be more inclined to

1 click the first link at the top of the search  
2 results page?

3 MS. CARUSO: Objection.

4 THE WITNESS: Potentially, yes.

5 BY MR. LELAND:

6 Q. Well, and you didn't ask Google for any  
7 of their internal analyses about traffic that's  
8 generated based on a company's position in paid  
9 search?

10 A. No, I did not.

11 Q. Because you, your conclusion is that, is  
12 that the advertising, per se, this program, this is  
13 how I interpret it, advertising, per se, the Adwords  
14 program is not capable of causing the consumer  
15 confusion?

16 MS. CARUSO: Objection, mischaracterizes  
17 his report.

18 BY MR. LELAND:

19 Q. Have I mischaracterized your statement  
20 in that regard?

21 A. Well my statement I think will speak for  
22 itself, that the variations suggests that to the



1 extent confusion exists it's not inherent in paid  
2 search results.

3 Q. Okay.

4 A. It is a specific advertisement that is  
5 capable of causing confusion, not advising, per se.  
6 I think I'll stop there now.

7 Q. What is it about the specific  
8 advertisements that would be capable of causing  
9 confusion?

10 A. The, the nature of the company, the  
11 wording of the ad, you know, the claims made.

12 Q. Would you agree that the inclusion of  
13 Rosetta Stone's name in the ads would increase the  
14 likelihood of confusion?

15 MS. CARUSO: Objection.

16 THE WITNESS: There is, in general I  
17 think that's a reasonable statement and there is  
18 some evidence of that in the, in the results.

19 BY MR. LELAND:

20 Q. Do you understand that Rosetta Stone's  
21 complaint in this case is not only that Google is  
22 improperly selling Rosetta Stone's marks to third